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Argued by
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

Docket No. 54

MICHAEL J. REGAN,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON A WRIT OF CERTIORARI TO THE
COURT OF APPEALS, STATE OF NEW YORK

BRIEF FOR RESPONDENT

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32 CASE PRESS, 30 Forty Street, N. Y. C.—COrtlandt 7-0484-0485

The chronology of petitioner's appearances before the Grand Jury and the Court and the page references where the minutes thereof were offered in evidence and are printed *in extenso* follow:

March 7, 1951, Exhibit 6, R. 107, 109
October 22, 1952, Exhibit 7, R. 117, 119
November 12, 1952, Exhibit 8, R. 117, 120
December 22, 1952, Exhibit 9, R. 117, 121
January 5, 1953, Exhibit 10, R. 118, 130.

The Defense

Petitioner did not testify in his own behalf. He called, as his sole witness, Gerald V. Clarke an Assistant District Attorney who attended upon the execution of the waiver of immunity.

Mr. Clarke's version of the circumstances surrounding the execution of the waiver of immunity looms large on the horizon of petitioner's contentions in this Court. We think therefore that his testimony requires particular analysis:

The waiver of immunity was read by petitioner before he signed it (R. 164). Part of it is in his own hand (R. 140). It was executed in an anteroom adjacent to the Grand Jury, in which were contained a desk and bench (R. 157). The room was crowded at one time and there might have been thirty-five or twenty-five men, all police, no civilians. When the waiver was signed, "they were going in and out" (R. 159). Mr. Clarke made a statement to all of these policemen while petitioner was in the room in a voice loud enough for all to hear (R. 160, 164). He told petitioner that if the waiver was not signed, it would be reported to the Police Commissioner (R. 172). He advised petitioner

TABLE OF CONTENTS

PAGE

STATEMENT 1

RECORD FACTS 2

ARGUMENT 11

POINT I—
Petitioner in none of the state courts suggested duress perforce Section 903, New York City Charter, in the execution of his waiver of immunity. This contention urged initially before this Court should be rejected 11

POINT II—
There is no evidence in this record that petitioner executed the waiver of immunity under the duress of Section 903 of the New York City Charter 18

POINT III—
Duress cannot be predicated upon Section 903 of the New York City Charter as a matter of law 21

POINT IV—
Petitioner's contention that he did not understand the waiver is untenable. It was resolved against him by the jury, whose verdict on conflicting evidence should not be disturbed 23

POINT V—
Petitioner's contention that dubiety concerning the validity of the waiver excused his contempt is not reviewable in this Court 27

POINT VI—
Petitioner's argument that he has been deprived illegally of his constitutional privilege against self-incrimination is untenable 28

PAGE

POINT VII—
Upon this record, there is no evidence that any constitutional right, privilege or immunity of petitioner has been abridged. Proceedings in the state court resulting in the judgment in review were in conformity with accepted concepts of due process 33

CONCLUSION 35

CASES CITED

Adler v. Board of Education, 342 U. S. 485, 496; 72 S. Ct. 380; 96 L. Ed. 517 ..... 17, 22
Adamson v. California, 332 U. S. 46; 67 S. Ct. 1672, 91 L. Ed. 1903 29
Antonsen v. Bay Ridge Savings Bank, 292 N. Y. 143, 146 26
Ashcroft v. Tennessee, 322 U. S. 143, 153; 64 S. Ct. 921; 88 L. Ed. 1192 24
Beauharnais v. Illinois, 343 U. S. 250; 72 S. Ct. 725; 96 L. Ed. 919 17
Betts v. Brady, 316 U. S. 455; 62 S. Ct. 1252; 86 L. Ed. 1595 ..... 25, 27
Board of Trustees v. O. D. Wilson Co., 133 Fed. 2nd, 399 22
Bothwell v. Buckbee Mears Co., 275 U. S. 274, 279; 48 S. Ct. 124; 72 L. Ed. 277 17
Brown v. Allen, 344 U. S. 443; 73 S. Ct. 397, 437; 97 L. Ed. 469 18
Brown v. Walker, 161 U. S. 591; 16 S. Ct. 644; 40 L. Ed. 819 31
Buchalter v. New York, 319 U. S. 427; 63 S. Ct. 1129; 87 L. Ed. 1492 28
Bute v. Illinois, 333 U. S. 640; 68 S. Ct. 763; 92 L. Ed. 986 25

"I said, (to petitioner) 'If you do not sign this waiver of immunity and if you are put into the Grand Jury then by the District Attorney, anything you testify could not be used against you.' I said, 'Under the Penal Law and under the City Charter, being you are a city employee, the same as I am or the same as anybody else in the Department of Sanitation or Fire Department, you are requested, if the District Attorney sees fit, to sign such a waiver and to testify before the Grand Jury. Now,' I said, '*We are not forcing you to sign this waiver if you don't want to sign it.* In your case we will report the fact to the Police Commissioner, and if we report the fact to the Police Commissioner that you refused to sign a waiver of immunity and testify before the Grand Jury, in that case you will possibly lose your job, because under the City Charter you have to sign such a waiver.' I also told him that this testimony could be used during the life of the Grand Jury by the District Attorney or by the Grand Jurors themselves" (R. 172). (Emphasis supplied.)

Of utmost significance is an event which transpired immediately after petitioner executed the waiver. He was ushered into the Grand Jury room where he was questioned as follows (People's Exhibit 6, R. 107, 109):

"Q. Patrolman Regan, I show you this piece of paper, which is a waiver of immunity. Is that your signature thereon? A. That is.

"Q. And was it signed by you in the presence of Richard Alleyne, a notary public? A. It was.

"Q. And do you fully understand the meaning of this waiver, explained to you by myself? A. I do.

"Q. And you signed it voluntarily? A. I did.

"Mr. Clarke: I offer in evidence the waiver of immunity just identified by the witness.

PAGE

Chambers v. Florida, 309 U. S. 227, 238; 60 S. Ct. 472; 84 L. Ed. 716 24
Counselman v. Hitchcock, 142 U. S. 547; 12 S. Ct. 195; 35 L. Ed. 1110 31

Deshong v. City of New York, 176 N. Y., 475, 479.. 22

Garner v. Board of Public Works, 341 U. S. 716; 71 S. Ct. 909; 95 L. Ed. 1317 21
Glickstein v. U. S., 222 U. S. 139, 141; 32 S. Ct. 71; 56 L. Ed. 128 31
Great Northern Railway Co. v. Donaldson, 246 U. S. 121, 124; 38 S. Ct. 230; 62 L. Ed. 616 24
Gryger v. Burke, 334 U. S. 728; 68 S. Ct. 1256; 92 L. Ed. 1683 28

Harding v. Illinois, 196 U. S. 78, 83; 25 S. Ct. 176; 49 L. Ed. 394 28

Leyra v. Denno, 347 U. S. 556, 558 ..... 24, 29
Lisenba v. California, 314 U. S. 219, 238; 62 S. Ct. 280; 86 L. Ed. 166 ..... 24, 33
Lyons v. Oklahoma, 322 U. S. 596; 64 S. Ct. 1208; 88 L. Ed. 1481 23

Malinski v. New York, 324 U. S. 401; 65 S. Ct. 781; 89 L. Ed. 1029 33
Matter of Doyle, 257 N. Y. 244 31
Matter of Grand Jury of the County of Kings (Nicastro-Chadeayne), 279 App. Div. N. Y. 915, aff'd 303 N. Y. 983 31
McGoldrick v. Compagnie Generale, 309 U. S. 430, 434, 435; 60 S. Ct. 670; 84 L. Ed. 849 21

Palko v. Connecticut, 302 U. S. 319; 58 S. Ct. 188; 82 L. Ed. 288 29
People v. Breslin, 306 N. Y. 294; cert. denied 347 U. S. 1014 29
People v. Guardino, 286 N. Y. 132, 135 26

"Waiver of immunity referred to received in evidence and marked People's Exhibt 317, of this date.

"(Witness was thereupon sworn.)"

POINT I

Petitioner in none of the state courts suggested duress perforce Section 903, New York City Charter, in the execution of his waiver of immunity. This contention urged initially before this Court should be rejected.

Woven throughout petitioner's argument is the skein of *force majeure;* "the waiver of immunity was compelled by Section 903, New York City Charter" (brief, Point I). Section 903 declares the employment of a city servant *ipso facto* forfeited upon his refusal to waive immunity from prosecution when summoned to testify before a Grand Jury concerning the property, government or affairs of the City.

Neither at the trial of this indictment nor in either of the appellate tribunals of New York was this contention urged by petitioner.

1. Petitioner's contentions at the trial.

Before the trial court and jury, petitioner's theory pursued the following course:

When he executed the waiver of immunity, he did not know what he was doing and did not understand the document. Assistant District Attorney Clarke, who supervised the execution was under some duty of explaining the sig-

PAGE

People v. Regan, 282 App. Div. N. Y. 775; aff'd 306 N. Y. 747; certiorari granted 347 U. S. 1010 ..1, 2, 13, 15

Quicksall v. Michigan, 339 U. S. 660; 70 S. Ct. 910; 94 L. Ed. 1188 .....25, 33, 34

Rochin v. California 342 U. S. 165 33

Snyder v. Commonwealth, 291 U. S. 97, 122; 54 S. Ct. 330; 78 L. Ed. 674 34

Stein v. New York, 346 U. S. 156, 181; 73 S. Ct. 1077; 97 L. Ed. 1522 28

Taylor v. Mississippi, 319 U. S. 583; 63 S. Ct. 1200; 87 L. Ed. 1600 24

Twining v. New Jersey, 211 U. S. 78; 29 S. Ct. 14; 53 L. Ed. 97 29

Uveges v. Pennsylvania, 335 U. S. 437; 69 S. Ct. 184; 93 L. Ed. 127 25

Whitney v. California, 274 U. S. 357, 362, 363; 47 S. Ct. 641; 71 L. Ed. 1095 17

Wilson v. Cook, 327 U. S. 474, 483; 66 S. Ct. 663; 90 L. Ed. 793 17

STATUTES

Charter of the City of New York:
Sec. 903 11

New York Penal Law:
Sec. 370 30
Sec. 381 30
Sec. 580 30
Sec. 584 30
Sec. 600 2
Sec. 970 30
Sec. 996 30

nificance of the waiver to him, in the discharge of which, Mr. Clarke was derelict. The waiver, therefore, was not binding upon him. Judge Leibowitz improperly ruled that he must testify under a valid waiver of immunity and consequently his refusal to comply therewith cannot be considered legally as a contempt of court.

At the opening of the trial, petitioner moved to dismiss the indictment upon the ground that he had been directed to answer questions under an effective waiver of immunity, which he contended was improper since the District Attorney had not advised him of his right not to sign the waiver and that he was not aware of the "meaning" and "magnitude" of this waiver (R. 57, 58). Again at Record, 147, the conclusion of the People's case, the motion to dismiss the indictment was posited upon the contention that the People had failed affirmatively to show that they had advised petitioner prior to the execution of the waiver of his constitutional rights and the fact that he did not have to sign it. Further in the course of the trial at Record 96 and 97, the following transpired:

> "The Court: Mr. Hellenbrand concedes that. There is only one main issue that he raises in this case. He said that the man signed a waiver of immunity but he did not know what he was signing; he did not have full appreciation of what he was signing and that, therefore, the waiver was inactive and inoperative and that therefore, if he was compelled to testify on the basis of that waiver, his constitutional rights were being violated; is that not right?
>
> Mr. Hellenbrand: That is not what I say, Judge. That is part of what I say.
>
> The Court: All right.

PAGE

Authorities

Restatement of Law of Contracts:
Sec. 492 22

Williston on Contracts:
Rev. Ed. (1936) Vol. V., pages 4497, 4500 ..... 18, 22

Mr. Hellenbrand: I say one other thing, that there was an affirmative duty of the prosecuting attorneys—

The Court: That is part of the question as to whether the waiver was operative.

Mr. Hellenbrand: Because I said to your Honor that even if Mr. Regan understood it, which I am not conceding, but even if he understood it, it was the affirmative duty of the District Attorney to tell him.

The Court: That is your contention.

Mr. Hellenbrand: That is my contention."

Petitioner's position was iterated in the charge of the Court at Record, 199, to which no exception was noted, as follows:

"The issue has been clarified in this case through the talents of these fine lawyers before this Court. When a man signs something, he must know what he is signing. Otherwise, the signature is ineffectual. He must have a conscious understanding of what he is signing. The People are in duty bound, on all of the facts and circumstances, to establish that this defendant knew full well what he was signing when he signed the waiver; that he knew full well the implications involved in signing the waiver."

And again at Record, 200 the Court instructed the jury:

"It is for you to say whether or not he knew what he was signing and knew the full import of what he was signing. That seems to be the 'bone of contention,' the issue in this case. It is very strenuously contested by both sides."

That this was petitioner's contention was emphasized in the opinion of the Appellate Division affirming the judgment of conviction (282 App. Div. 775) as follows:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

Docket No. 54

MICHAEL J. REGAN,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

BRIEF FOR RESPONDENT

Statement

An order filed herein on June 7, 1954, granting his application for writ of certiorari (347 U. S. 1010), brings to this Court for review a judgment convicting petitioner of the Crime of Criminal Contempt of Court.

The judgment was entered in the County Court of Kings County, State of New York, the court of original jurisdiction, on April 9, 1953. It was unanimously sustained in an intermediate appellate tribunal (282 App. Div. N. Y. 775),

and again unanimously affirmed in the Court of Appeals, the state court of last resort in New York (306 N. Y. 747).

Petitioner was convicted by the verdict of a jury predicated upon an indictment which accused him of the contumacious and unlawful refusal to answer a legal and proper interrogatory propounded to him as a witness before a duly constituted Grand Jury. This conduct is declared to be a misdemeanor (New York Penal Law, Section 600). The indictment is set forth in this record at pages 7 through 10.

Record Facts Material to the Questions Presented

Petitioner was a police officer in the Police Department of the City of New York, having been appointed in 1942 (R. 75). During a substantial period of his tenure in the Police Department, he was assigned to duty as a plainclotheman, attached variously to Division Offices and to the Police Commissioner's plainclothes squad (R. 75, 76). On March 27, 1951, petitioner was "dropped from the rolls" of the Police Department (R. 77).

Plainclothes squads are specifically enjoined to enforce laws against gambling (R. 78).

On March 7, 1951, petitioner appeared as a witness before a Grand Jury in the County of Kings, State of New York, where an oath was duly administered to him (R. 83, 84). It was conceded that said Grand Jury was duly constituted and functioning in that capacity (R. 82).

Prior thereto, petitioner had executed and delivered a formal waiver of immunity (R. 84). This waiver subsequently marked in evidence reads as follows (Peo. Ex. 2; R. 145, 146):

"It was defendant's contention upon the trial that a waiver of immunity executed by him prior to his appearance before the grand jury, while he was a New York City police officer, was ineffective, as he had not understood the full nature and scope of his act and the District Attorney had failed to advise him of his rights."

2. Petitioner's contentions in the Appellate Division.

At pages 3 and 4 of petitioner's brief in the Appellate Division on his initial appeal from the judgment of conviction herein, he stated:

"The appellant contends as follows:

1. That the record of the trial indicates that the appellant was not made aware of his constitutional privileges and rights in connection with the execution of the waiver of immunity and that there was no conscientious effort on the part of the prosecuting officers to explain to this appellant his constitutional right to refuse to sign such a waiver of immunity, as well as the meaning and significance thereof. Accordingly, the appellant urges that the direction of Judge Leibowitz that defendant-appellant give answers under an 'effective waiver of immunity' was error. Further, appellant urges substantial error in the court's charge to the jury in refusing to charge that the witness must be 'made aware' of his rights before he is asked to sign a waiver of immunity (fol. 626). Further, error was made in the court's charge in refusing to charge that the District Attorney must make a conscientious effort to advise a witness with respect to his rights prior to the execution of a waiver of immunity (fol. 627).

2. That the appellant signed the waiver of immunity under instructions from the District Attorney

"County Court, Kings County

The People of the State of New York

—against—

John Doe,

Defendant.

Waiver of Immunity

I, Michael J. Regan, of No. 3819 Harper Avenue, Bronx, Borough of Brooklyn—

* * * * *

of the City of New York pursuant to the provisions of Section 2446 of the Penal Law of the State of New York, do hereby waive all immunity which I would otherwise obtain from indictment, prosecution, punishment, penalty or forfeiture for or on account of or relating to any transaction, matter or thing concerning which I may testify or produce evidence, documentary or otherwise, before the Grand Jury of the County of Kings, in its investigation above entitled or in any other investigation or other proceeding, before any judge or justice, court or other tribunal, conducting an inquiry for (*sic*) legal proceeding relating to the acts of said John Doe, Michael J. Regan, or of any other person.

I do hereby further waive any and all privileges which I would otherwise obtain against the use against me of the testimony so given or the evidence so produced upon any criminal investigation, prosecution or proceeding.

(Signed) Michael J. Regan.

Witness:
Gerald V. Clarke—"

tantamount to a direction to sign a waiver of immunity.

3. That the inflammatory remarks of the District Attorney at summation precluded a fair and impartial trial.

4. That until the determination of the rights of the appellant, there could be and was no criminal contempt of court."

It is significant that in the Appellate Division not only did petitioner fail to claim duress by Section 903 of the City Charter, but indeed no constitutional question of any nature was presented.

3. Petitioner's contentions in the Court of Appeals.

The Court of Appeals amended the remittitur to certify that upon that appeal petitioner's contention, that he was denied due process and his constitutional privileges and immunities under the Fourteenth Amendment, was passed upon and rejected (306 N. Y. 875). The order of amendment was not accompanied by any opinion. We think, therefore, that this record and briefs may be searched to ascertain the *specific* respects in which petitioner before the Court of Appeals claimed that his constitutional rights had been abridged. At pages 6 and 7 of his brief in the Court of Appeals, petitioner stated the issues presented to that Court thus:

"Two issues of law, preserved by appropriate objections and exceptions of appellant below, are presented on this appeal: (1) Whether appellant, against whom a grand jury investigation is concededly being directed, may lawfully refuse to answer questions concerning his commission of a series of felonies, notwithstanding his execution of a waiver

The subsequent appearance of petitioner before the Grand Jury occurred on October 22, 1952, when a form of financial questionnaire was delivered to him (R. 88). He was instructed to return it, answered, on November 12, 1952, to which he acquiesced (R. 119).

On November 12, 1952, he reappeared before the Grand Jury (R. 88). His questionnaire had not been completed and his examination was adjourned to afford him additional time pursuant to his request (R. 120).

We now approach the immediate circumstances which culminated in this indictment.

On December 22, 1952 petition again appeared before the Grand Jury (R. 89).* He reaffirmed his prior execution of the waiver of immunity. He was then asked (R. 122):

> "While you were a plainclothesman in the Police Department of the City of New York, did you ever accept or receive any bribes from bookmakers or other gamblers."

In reply petitioner stated his desire to read a statement to the Grand Jury. The statement thus read, follows (R. 122, 123):

> "Upon the advice of my counsel I decline to testify on the ground that my testimony might tend to incriminate me and subject me to other penalties.
>
> I claim my Constitutional and Statutory privileges and immunities. It is claimed that I signed a waiver of immunity before this body sometime in March of 1951.

---

* Petitioner's assertion that he was arrested (brief p. 7) finds no support in this record.

> of immunity some twenty-two months previously, at a time when he was not interrogated and had no reason to believe that the investigation was directed against him; and (2) Whether, upon indictment and trial for such refusal to answer, failure of the trial judge to leave the elemental issue of fact of appellant's alleged contumacity to the jury, as requested by appellant, errors in the conduct of the trial and sentencing the appellant, do not at the very minimum require reversal of the conviction and a new trial."

In Point III of his brief in the Court of Appeals, petitioner contended that his conviction violated the due process and privileges and immunities clause of the Fourteenth Amendment to the Federal Constitution. This argument was predicated not on the theory of duress, but upon the suggested privilege against self-incrimination, "liberty of silence" and "right of privacy".

It is evident that in no proceeding in the state courts did petitioner claim that his waiver of immunity was coerced by the City Charter.* Where a Federal Constitutional question was intimated, it was posited not upon the theory of duress, but rather the violation of the privilege against self-incrimination.

As a matter of principle, the belated contention of duress should be repudiated. Immanent in the concept of justice is orderly judicial procedure. The practice of urging one claim in the court of original jurisdiction and different contentions in successive appellate courts, inspired by nothing more persuasive than the naive hope that somewhere, some argument will capture the judicial imagina-

* Indeed, even in the petition for the writ of certiorari *sub judice* this contention is not squarely presented.

I claim that I was not aware of the nature of this waiver of immunity; that at that time of its execution I was not represented by counsel and I was not advised by anyone that I did not have to sign the same nor at the time of the execution of this waiver was I explained my Constitutional rights or the meaning of the waiver of immunity.

I should like to add that since I signed the waiver of immunity I have resigned from the Police Department of the City of New York in March 1951 after having served nine years, two months and several days. So far as I know I have never been mentioned by anyone in connection with the present investigation either at the criminal trial or the Police Department Trial. Inasmuch as approximately one year and nine months have elapsed since the execution of my waiver of immunity and inasmuch as I claim my Constitutional rights were not properly safeguarded or explained to me, there is doubt and uncertainty concerning my status as a witness and my privileges and duties as such."

It will be marked that despite his prior appearances before the Grand Jury, this was the first time that petitioner declined to testify or alleged a privilege against self-incrimination or disavowed the waiver of immunity which had been executed by him some eighteen months earlier (R. 136).

It was stipulated upon the trial as follows (R. 127-130):

Upon petitioner's refusal to testify, on December 22, 1952, an application was immediately made in open court before Judge Leibowitz to overrule his objection and direct him to testify. A plenary hearing was subsequently held on January 5, 1953, at which petitioner appeared in person

tion, should be discouraged. The trial court did not submit the issue of duress to the jury. Despite numerous requests for additional instructions to the jury, petitioner did not solicit a charge on the subject of duress (R. 207-212). Thus, neither the trial jury nor the state courts of original jurisdiction or review passed upon any issue of duress. The vigor with which this claim is now pressed upon this Court can hardly be reconciled with petitioner's failure to urge it as a defense in any of the proceedings below. It is clearly an afterthought.

We respectfully suggest that both on principle and on law, this Court should reject a contention of duress.

> *Whitney* v. *California*, 47 S. Ct. 641, 71 L. Ed. 1095; 274 U. S. 357, 362, 363;
> *Wilson* v. *Cook*, 66 S. Ct. 663; 327 U. S. 474, 483; 90 L. Ed. 793;
> *Bothwell* v. *Buckbee Mears Co.*, 48 S. Ct. 124; 275 U. S. 274, 279; 72 L. Ed. 277;
> *Adler* v. *Board of Education*, 342 U. S. 485, 496; 72 S. Ct. 380; 96 L. Ed. 517.

In *Beauharnais* v. *Illinois*, 343 U. S. 250; 72 S. Ct. 725; 96 L. Ed. 919, at pages 264 and 265, it is said:

> "Neither by proffer of evidence, requests for instructions, nor motion before or after verdict did the defendant seek to justify his utterance as 'fair comment' or as privileged. Nor has the defendant urged as a ground for reversing his conviction in this Court that his opportunity to make those defenses was denied below. And so, whether a prosecution for libel of a racial or religious group is unconstitutionally invalid where the State did deny the defendant such opportunities is not before us * * *. The benefits of hypothetical defenses, never raised below

and by an attorney who likewise represented him on the trial of this indictment. Upon the completion thereof, Judge Leibowitz overruled petitioner's objections, held that the waiver of immunity was effective and binding upon him and directed him to return to the Grand Jury and testify.

It was conceded by petitioner that on the occasion of his appearance before it, the Grand Jury was investigating "whether any of these policemen had swollen bank accounts and swollen assets which could be traced to the graft that was allegedly being passed by the bookmakers to the police, so that the bookmakers would have protection and carry on their business without interruption by the police" (R. 91). Petitioner agreed that the Grand Jury had a "right to investigate that" (R. 91). The questions put to him were relevant and not "in the wild air" (R. 97).

Petitioner reappeared before the Grand Jury (R. 130). The following questions were then put to him to which he replied (R. 131, 132):

> "Q. Mr. Regan, this morning you appeared before County Judge Leibowitz, did you not? A. I did.
>
> Q. There was a hearing conducted before County Judge Leibowitz concerning a statement made by you on your appearance on December 22, 1952 with respect to your testifying? A. That's right.
>
> Q. Did Judge Leibowitz direct you to return to this Grand Jury and answer all legal and appropriate interrogatories? A. He did.
>
> Q. Did he tell you, in words or substance, that he overruled your claim that your waiver of immunity was not effective and that when you testified you would have to testify under a valid, effective and legal waiver of immunity? A. He did.

> or pressed upon us, are not to be invoked in the abstract."

This Court has enunciated a pertinent and applicable principle that state autonomy in law enforcement is not to be eroded through indefinite charges of unconstitutional action.

> *Brown* v. *Allen*, 73 S. Ct. 397, 437; 344 U. S. 443; 97 L. Ed. 469.

POINT II

There is no evidence in this record that petitioner executed the waiver of immunity under the duress of Section 903 of the New York City Charter.

Whether or not this Court may search the record to ascertain if the specific *claim* now pressed upon it was presented to any State court, certainly it is not foreclosed from such scrutiny to determine whether it contains any cognizable *evidence* to support that claim. We urge that there is no record *evidence* that petitioner executed the waiver perforce the City Charter provision. Williston in his work on "Contracts" (Rev. Ed. 1936, Vol. 5, p. 4497), states that before a transaction may be avoided on account of duress "it must appear that the consent of the party seeking to avoid the transaction was coerced. That is, that he was actually induced by the duress * * * to give his consent and would not have done so otherwise".

Petitioner did not testify in his own behalf at the trial or on the preliminary hearing before Judge Leibowitz. On two occasions, subsequent to the execution of his waiver, petitioner appeared before the Grand Jury, represented

Q. Now, you have been recalled to this Grand Jury, have you not? A. Yes, sir.

* * * * *

Q. I now ask you, Mr. Regan, while you were a plainclothesman in the Police Department of the City of New York, did you receive any bribes from bookmakers? A. I'd like to read a statement at this time.

Q. Well, first, will you answer the question or do you refuse to answer? A. I refuse to answer the question.

Q. Now, read it slowly and loudly. A. (Reading.)

Upon the advice of my counsel I decline to testify on the ground that my testimony right tend to incriminate me and subject me to other penalties.

I claim my constitutional and statutory privileges and immunities.

It is claimed that I signed a waiver of immunity before this body sometime in March of 1951 and that this waiver remains effective and I must testify without any immunity that I would otherwise have. I claim that this waiver is not effective because I was not aware of the nature of this waiver of immunity; that at that time of its execution I was not afforded an opportunity to employ counsel and that I was not advised by anyone that I did not have to sign a waiver nor at the time of the execution of this waiver was I explained my Constitutional rights or the meaning of the waiver of immunity.

I claim my Constitutional rights were not properly safeguarded or explained to me and that there is a doubt and uncertainty concerning my status as a witness and my privileges and duties as such.

Q. Does that conclude your statement? A. It does.

* * * * *"

by counsel, and stated the basis of his refusal to testify. Never did he say that he executed the waiver because of the supervening duress of the City Charter. Petitioner was the sole repository of knowledge as to his reasons for signing the waiver. On the record *sub judice*, these reasons are the subject only of speculation and conjecture. Argument of his counsel in a brief to this Court that the waiver was executed perforce the statute, is but a gratuitous assumption, where *petitioner* did not assert the coercive force of the statute as the reason.

The pertinent record discloses simply the physical fact that a waiver of immunity was executed. The New York City Charter declares forfeit the office of an employee who refuses to sign such a waiver. It does not follow as a matter of common sense and logic that on those facts alone the waiver was delivered *because of the* statute. There is no evidence in this record of any imperative relation between these two established factors. There is testimony by Assistant District Attorney Clarke that petitioner's refusal to sign the waiver would invite notification thereof to the Police Commissioner, but the record does not disclose that this was the inducing cause of the waiver. *Non constat*, petitioner executed the waiver inspired by a conviction that he had committed no offense, had nothing to conceal or by the desire to surround his conduct with the aura of honesty and moral rectitude.

This Court is now requested to *presume* from the naked co-existence of the waiver and the provision in the City Charter, that the former was inexorably induced by the latter. We do not believe it consonant with accepted judicial procedure to posit a reversal of a state judicial determination upon tenuous inference.

"as to what this Grand Jury was concerned with" at or before he signed the waiver (R. 162), and that "if he is going to be put in the Grand Jury he must sign the waiver" (R. 163).

Twenty-five minutes were consumed by the thirty-five men, including petitioner in executing their respective waivers all in the immediate presence of Mr. Clarke (R. 164). *The former called everything on the waiver to petitioner's attention and explained it and petitioner read the waiver and told Mr. Clarke that he understood it* (R. 167, 168).

Mr. Clarke advised petitioner that by reason of his signing the document, he waived all immunity which petitioner would otherwise have from indictment, prosecution, punishment, penalty or forfeiture within the scope of the Grand Jury investigation, or in any other investigation or other proceedings before any judge, court or tribunal (R. 167). Mr. Clarke explained everything on the waiver to petitioner who read it and said that he understood it (R. 168). Mr. Clarke told appellant that whatever he testified to in the Grand Jury could be used against him by said jury or the District Attorney, and that when he signed the waiver and was subsequently prosecuted, the waiver would be effective even in such prosecution (R. 168). Mr. Clarke also advised petitioner that the testimony he gave before the Grand Jury could be used against him at any trial, or form the basis of an indictment (R. 170, 171).

At the hearing before Judge Leibowitz on January 5, 1953, Mr. Clarke testified:

Petitioner suggests that the fact of thirty-five police officers executing waivers within twenty-five minutes constitutes a "pattern of duress" (brief, p. 13). We reply that there is no *evidence* in this record that petitioner's volition and freedom of choice were overpowered by those circumstances.

At pages 8 and 9 of his brief, petitioner stresses the statement of the District Attorney to the jury in summation anent the dilemma in which he was placed, *viz.*, to be prosecuted for bribery, perjury or contempt. The inference is made that this record evidences inevitable prosecution for one of those crimes. We submit, however, that his argument completely distorts the object of the prosecutor's remarks. Petitioner's quotation of the summation contained at pages 8 and 9 of his brief is isolated and divorced from the surrounding text. An examination of the summation at Record, 178 and 179 commencing particularly at folio 534 indicates that the prosecutor was arguing to the jury the probable motive underlying petitioner's refusal to answer, to indicate that it was deliberate and calculated. In substance, the prosecutor reasoned that petitioner, *in his own mind*, was confronted with the three alternatives of prosecution and the least dangerous or serious was to remain mute and incur citation for contempt, a misdemeanor, comparatively less serious crime than the felonies of bribery and perjury. However, this record contains no evidence that the District Attorney had any proof against petitioner of bribery or of perjury. Contrary to petitioner's argument, there is no evidence that prosecution was inevitable regardless of the nature of his answer to the Grand Jury's question or of his refusal to reply.

POINT III

Duress cannot be predicated upon Section 903 of the New York City Charter as a matter of law.

Petitioner has launched a flank attack upon the constitutionality of the City Charter section. The record does not disclose that the constitutionality of the statute was directly challenged in any of the lower courts (*McGoldrick* v. *Compagnia Generale*, 309 U. S. 430, 434, 435; 60 S. Ct. 670; 84 L. Ed. 849). By its provision, a City employee must account for his official conduct in a Grand Jury investigation under a waiver of immunity or forfeit his employment. He is not compelled to answer for any activity beyond his official duties. The impact of the statute does not extend beyond the reasonable requirement that public employees should account for their conduct in the discharge of official duty. It is no more repugnant to due process than a statute compelling public officials to take a non-communist oath. *In Garner* v. *Board of Public Works*, 71 S. Ct. 909; 95 L. Ed. 1317; 341 U. S. 716, involving such loyalty oath, this Court said at page 720:

> "We think that a municipal employer is not disabled * * * from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service."

And at page 721:

> "the statute was reasonably designed to protect the integrity and competency of the service * * *. The Charter amendment defined standards of eligibility for employees and specifically denied City employment to those persons who thereafter should not

> comply with these standards * * * from its effective date it terminated any privilege to work for the City in the case of persons who thereafter engaged in the activity proscribed."

To the same effect is *Adler* v. *Board of Education of the City of New York, supra,* p. 17.

If Section 903, New York City Charter is a valid and reasonable regulation, no claim of duress may be posited upon it. Legal duress, cognizable in law, connotes wrongful or venal conduct by a contracting party exerted against another. (Restatement of Law of Contracts, Section 492, cited with approval in *Williston, on Contracts*, Revised Ed., Vol. V, p. 4497.) In *Deshong* v. *City of New York,* 176 N. Y. 475, 479, the Court said:

> "Payment coerced by duress or unlawful compulsion may be recovered back. The coercion, however, must be illegal, unjust or oppressive."

Williston, *supra,* at page 4500 declares:

> "One element of the early law of duress continues to exist, however its boundaries may be otherwise extended. The pressure must be wrongful and not all pressure is wrongful."

At bar, petitioner was confronted with the alternative of forfeiting his office or executing the waiver. No wrongful pressure was exercised by the statute. He could have refused to execute the document and have instituted legal proceedings to contest the forfeiture of his office.

> *Board of Trustees* v. *O. D. Wilson Co.,* 133 Fed. 2nd, 399.

POINT IV

Petitioner's contention that he did not understand the waiver is untenable. It was resolved against him by the jury, whose verdict on conflicting evidence should not be disturbed.

There is competent evidence in this record that petitioner did understand the contents of the waiver of immunity (R. 162, 163, 164, 167, 168, 170, 171, 172, 107, 109). Contrary evidence is discovered only in two statements made by the petitioner to the Grand Jury (R. 122, 123; 131 132). The trial court instructed the jury "that even though the defendant stated before the Grand Jury that he understood the meaning of the waiver of immunity, it is incumbent upon the People to prove beyond a reasonable doubt that this defendant did so understand it" (R. 211 fol. 633; 212 fol. 634; also R. 199 at fol. 597). Petitioner now invites this Court to breach the classic barriers that separate the functions of the court and jury, and to conclude that his statements are to be accepted as a matter of law.

Since the facts were in dispute, we respectfully suggest that this tribunal should accept the verdict that petitioner did comprehend the meaning and nature of the waiver. In *Lyons* v. *Oklahoma*, 64 S. Ct. 1208; 88 L. Ed. 1481; 322 U. S. 596 at 603, it is said:

> "To triers of fact is left the determination of the truth or error of the testimony of prisoner and official alike."

And in *Great Northern Railway Co.* v. *Donaldson*, 38 S. Ct. 236; 62 L. Ed. 616; 246 U. S. 121, 124, we note that:

> "It is not the province of this Court to weigh conflicting evidence."

A plethora of authority precludes review in this Court of the finding of the state court and jury on conflicting evidence.

> *Lisenba* v. *California*, 314 U. S. 219, 238; 62 S. Ct. 280; 86 L. Ed. 166;
> *Chambers* v. *Florida*, 309 U. S. 227, 238; 60 S. Ct. 472; 84 L. Ed. 716;
> *Ashcroft* v. *Tennessee*, 322 U. S. 143, 153; 64 S. Ct. 921; 88 L. Ed. 1192;
> *Taylor* v. *Mississippi*, 319 U. S. 583; 63 S. Ct. 1200; 87 L. Ed. 1600.

Petitioner's argument that the verdict "does not foreclose this Court's inquiry into the legal conclusions" (brief, p. 14) is applicable only to instances where the facts are *not in dispute* (e.g., *Leyra* v. *Denno*, 347 U. S. 556, 558).

Petitioner argues in his *brief* that the circumstances of the execution of the waiver by him together with thirty-five police officers in twenty-five minutes in a crowded room establishes lack of understanding of that document. Apart from this *brief*, *petitioner* on none of his appearances before the Grand Jury assigned that reason. For aught indicated in the record, this was simply a phase of evidence, a casual incident in the history of the case, unrelated to and unsupported by petitioner's claim that it contributed to misunderstanding.

In appraising the validity of this contention, the personality of petitioner should not be ignored.* This Court, in determining whether a denial of or failure to provide counsel is repugnant to due process, has considered the individual defendant, his intelligence, experience and education. The problem has been resolved "case by case".

Betts v. *Brady*, 316 U. S. 455; 62 S. Ct. 1252; 86 L. Ed. 1595;
Bute v. *Illinois*, 333 U. S. 640; 68 S. Ct. 763; 92 L. Ed. 986;
Uveges v. *Pennsylvania*, 335 U. S. 437; 69 S. Ct. 184; 93 L. Ed. 127;
Quicksall v. *Michigan*, 339 U. S. 660; 70 S. Ct. 910; 94 L. Ed. 1188.

We are not dealing here with an uneducated, illiterate individual, foreign to our customs, suddenly enmeshed in a web of technical legal procedure and floundering in a morass of doubt and uncertainty. Petitioner is a mature, experienced police officer, a man of intelligence and education. Before the Grand Jury he iterated his comprehen-

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* The trial court charged this jury at record 199, 200, folios 597, 598:

"Gentlemen, you have to use your common sense, your intelligence. You have a right to take into account who and what this man was, in determining whether or not he knew what he was doing when he put his signature to this waiver. Certainly, you have a right to take that into account, whether or not this was some ignorant person, unfamiliar with our ways and courts, or was it, on the other hand, a person who could be reasonably expected to know what this was all about. I am not venturing any opinion on it; I am putting the question in an interrogatory form, and not in a rhetorical sense. Please do not misunderstand me. I say specifically to you that you have a right to consider who and what the individual was, with whom are we dealing here? That is common sense, is it not?"

sion of the waiver (R. 107, 139). He read the waiver and Mr. Clarke explained its significance to him (R. 167, 168); all this, before it was introduced before the Grand Jury. What more should the prosecutor have done? Petitioner, a seasoned police officer, worldly-wise, executed this waiver. It was explained to him. He testified under oath that he understood it. The Court charged the jury to acquit unless they found that petitioner knew that he could not be compelled to execute the waiver (R. 212, fol. 635). At Record, 209, folio 627, the Court instructed the jury that petitioner could waive his constitutional privileges "only if it appears that he was aware of its existence and the surrounding safeguards, and voluntarily and intelligently made the waiver". At Record 211, folio 633, the Court further advised the jury that "even though the defendant stated before the Grand Jury that he understood the meaning of the waiver of immunity, it is incumbent upon the People to prove beyond a reasonable doubt that this defendant did so understand it." We must assume that in reaching its verdict the jury gave full heed to the instructions of the Court upon that subject.

People v. *Guardino*, 286 N. Y. 132, 135;
Antonsen v. *Bay Ridge Savings Bank*, 292 N. Y. 143, 146.

The ingenuity of man has not devised a mechanism for probing the secret recesses of the mind. The Grand Jury and prosecuting officials took petitioner at his word that he understood the waiver and received it in evidence. Now, many months later, petitioner before the Grand Jury for the first time, disclaimed understanding, but did not attribute such failure of comprehension to the mechanics of the execution of the document.

How were the Grand Jury or prosecuting officials derelict in their duty? What is it that we failed to explain to petitioner? What is it that he did not understand? What precise advice should have been given to him? We search his brief in this Court for a cogent reply, but in vain. There is no evidence of shocking official misconduct or failure to observe the ordinary decencies of human behavior. In *Betts* v. *Brady, supra*, at page 462 of the U. S. report, this Court said:

> "Due process of law * * * formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial."

POINT V

Petitioner's contention that dubiety concerning the validity of the waiver excused his contempt is not reviewable in this Court.

The courts of New York of original and appellate jurisdiction have concluded that petitioner's guilt of criminal contempt has been established beyond a reasonable doubt. Implicit in this determination is a rejection of petitioner's plea that his purely subjective confusion justified the refusal to reply to the Grand Jury's interrogatory. We urge that this conclusion finds complete support in the record.

If, however, we assume it erroneous, *arguendo*, it is nevertheless not the subject of consideration in this Court. It is Hornbook law that the general power to review or check the decisions of a state court of last resort is not an integrant of Supreme Court jurisdiction. There is no constitutional right involved in an error of state law nor does the guarantee of due process assure immunity from judicial error.

Stein v. *New York*, 346 U. S. 156, 181; 73 S. Ct. 1077; L. Ed. 1522;
Gryger v. *Burke*, 334 U. S. 728; 68 S. Ct. 1256; 92 L. Ed. 1683;
Buchalter v. *New York*, 319 U. S. 427; 63 S. Ct. 1129; 87 L. Ed. 1492;
Harding v. *Illinois*, 196 U. S. 78, 83; 25 S. Ct. 176, 49 L. Ed. 394.

POINT VI

Petitioner's argument that he has been deprived illegally of his constitutional privilege against self-incrimination is untenable.

Whether the privilege against self-incrimination guaranteed under the Fifth Amendment to the United States Constitution is embraced within the due process clause so that contravening state action is thereby interdicted is no longer a matter of philosophical abstraction. This Court has held:

1. This privilege vouchsafed in the Fifth Amendment is not applicable to state procedures.
2. The privilege is not an essential element in due process and is therefore not protected by the Fourteenth Amendment against state action.

Adamson v. *California*, 67 S. Ct. 1672; 91 L. Ed. 1903; 332 U. S. 46, concerned a California statute which permitted the failure of a defendant to explain evidence against him to be commented upon by counsel and considered by the court and jury. The validity of this statute was challenged under the due process clause of the Fourteenth Amendment as well as under the self-incrimination proviso of the Fifth Amendment. This Tribunal held that the defendant's rights under the Fifth Amendment had not been abridged because that amendment did not control state action, but was referable only to federal conduct. Also reaffirmed was the doctrine of *Twining* v. *New Jersey* (211 U. S. 78; 53 L. Ed. 97; 29 S. Ct. 14), and *Palko* v. *Connecticut* (302 U. S. 319; 82 L. Ed. 288; 58 S. Ct. 188), that exemption from compulsory self-incrimination in a state proceeding is not secured by any part of the Federal Constitution.

In *People* v. *Breslin*, 306 N. Y. 294, the defendant, a police officer, was convicted of the crime of criminal contempt of court for refusal to testify before the same Grand Jury as at bar. That case presented a fact situation similar to the instant, with the exception that Breslin had not executed a waiver of immunity. His refusal to testify was predicated upon the privilege against self-incrimination. On petition for certiorari to this Court, Breslin argued that his privilege in the state court was protected by the Federal Constitution. Certiorari was denied, *sub nom Breslin* v. *New York*, 347 U. S. 1014 (June 1954).

Whether this body of case law is now to be repudiated and the operative area of the Fifth Amendment extended to include state procedures (*Leyra* v. *Denno*, *supra*, foot-

note at p. 558) need not be determined on this review, for the reason, as we shall now evince, that petitioner's privilege against self-incrimination in fact has not been infringed.

Any testimony which might have been elicited from petitioner could not have been self-incriminatory because he had been granted complete statutory immunity from criminal prosecution. When petitioner appeared before the Grand Jury, that body was investigating into the possible commission of the crimes of Conspiracy (New York Penal Law, Section 580, *et seq.*), Gambling (New York Penal Law, Section 970, *et seq.*) and Bribery and Corruption (New York Penal Law, Section 370). At that time,* these statutes (Gambling, Section 996, Conspiracy, Section 584, Bribery, Section 381) provided that no person should be excused from testifying, but in the event he does, he shall not

> "be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify or produce evidence, documentary or otherwise, and no testimony so given or produced shall be received against him upon any criminal investigation, proceeding or trial."

These immunity statutes are coextensive with the constitutional guarantee against self-incrimination and therefore supplant the privilege incorporated in the Constitution of the United States as well as that of New York (Article 1, Section 6).

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* These statutes have since been amended to define the method by which immunity can be obtained (Laws of New York, 1953, Chapter 891, effective September 1, 1953).

Counselman v. *Hitchcock*, 142 U. S. 547; 12 S. Ct. 195; 35 L. Ed. 1110;
Brown v. *Walker*, 161 U. S. 591; 16 S. Ct. 644; 40 L. Ed. 819;
Glickstein v. *U. S.*, 222 U. S. 139, 141; 32 S. Ct. 71; 56 L. Ed. 128;
Matter of Doyle, 257 N. Y. 244;
Matter of Grand Jury of the County of Kings (Nicastro-Chadeayne), 279 App. Div. N. Y. 915, aff'd 303 N. Y. 983.

The New York statutes granted petitioner adequate and complete immunity from prosecution in exchange for his testimony before the Grand Jury.

Petitioner is in error when he states (brief, p. 6) that a question presented herein is:

> "2. Did the execution of a waiver of immunity by the petitioner under the circumstances of the facts of this case effectively waive his rights to be silent under the Federal Constitution?"

Petitioner did not waive this "rights to be silent". In the investigation by this Grand Jury, no right of silence existed. It was destroyed by the grant of immunity in the Gambling, Bribery and Conspiracy statutes of New York. Petitioner could not waive a right which he did not possess.

What he did relinquish under his waiver were the *benefits* which the cited immunity statutes conferred upon him in lieu of the annulled privilege against self-incrimination. These benefits so abandoned, as is manifest from a perusal of the waiver of immunity (R. 145, 146) consisted of the right not to be prosecuted for any crime which his testimony might disclose or to which it could furnish a link in a

chain of evidence, and of the right that his testimony should not be read against him in any criminal proceeding. The waiver of these benefits by petitioner did not operate retrospectively to restore the privilege against self-incrimination which had been destroyed by the immunity statutes. Thus, the question of the privilege is not before this Court, since, even if the waiver of immunity were declared a nullity, the right of silence nevertheless would not exist, having been withdrawn by statute.

At page 16 of his brief, petitioner says:

> "The self-incriminatory feature of this case hangs on the dilemma that petitioner found himself in of being required to testify or face this prosecution."

This predicament was more fanciful than real. There is no *evidence* in this record that inevitable prosecution confronted petitioner, as we have heretofore observed.

POINT VII

Upon this record, there is no evidence that any constitutional right, privilege or immunity of petitioner has been abridged. Proceedings in the state court resulting in the judgment in review were in conformity with accepted concepts of due process.

We acknowledge that the operative area of due process is not susceptible of precise delineation. This Court in *Rochin* v. *California*, 342 U. S. 165 at page 173, speaks of the general requirement

> "that states in prosecutions respect certain decencies of civilized conduct. Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice'."

In *Lisenba* v. *California*, *supra*, 314 U. S. at 236, the Court said:

> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice."

See also *Malinski* v. *New York*, 324 U. S. 401; 65 S. Ct. 781; 89 L. Ed. 1029; *Quicksall* v. *Michigan*, *supra*, p. 25.

Where the mechanics of prosecution in a state court degenerates into conduct which "shocks the conscience" (*Rochin*, *supra*, at p. 172) it will be condemned.

POINT I

The State, which has assured public employees selection on the basis of merit as well as tenure in their positions, may create conditions of employment calculated to assure honesty and loyalty in its employees.

1. Public employment in New York State offers advantages with concurrent obligations which distinguish it from private employment.

The Constitution of the State of New York provides that positions in the state and municipal service shall be filled on the basis of merit and fitness demonstrated by examination which, where practicable, is to be competitive (Art. V, § 6).

Implementing this constitutional mandate the New York State Legislature has promulgated a program whereby employees entering state or municipal service are assured continued employment provided they render good, loyal and faithful service. In order to guarantee this status the state has established by statute certain rights of tenure and protection against arbitrary dismissal, e.g., Civil Service Law § 22 (Cons. Laws, chap. 9); Education Law §§ 2573, 6206 (Cons. Laws, chap. 16); Administrative Code of the City of New York §§ 434a-14.0, 437a-12.0. It is thereby apparent that the state has created a status for its employees which is far more favorable than that enjoyed in private industry.

Concurrently and in order to protect the state from disloyal or dishonest employees the legislature has established certain requirements such as good character and moral fitness, to be met prior to employment, which exclude persons guilty of crimes, notoriously bad conduct

A fair appraisal of this record will disclose that petitioner was accorded fair and just treatment and an utter absence of conduct which "shocks the conscience".

This Court said in *Quicksall, supra*, U. S. report at page 665:

> "The record exacts the holding that the petitioner has failed to sustain the burden of proving such a disregard of fundamental fairness in the imposition of punishment by the State as alone would justify this court to invalidate the sentence by reason of the Due Process Clause."

Implicit in any state judicial system, albeit subject to constitutional restriction, is the power to compel testimony. This Grand Jury, in hot pursuit of corruption in public office, sought disclosure of vital information from petitioner. We do not suggest, needless to say, that laudable motives justify invasion of historic individual rights, constitutionally secured. Conversely, the effective administration of criminal justice is in grave jeopardy when the conduct of its executors is subjected to tests of rigid, ultra-refined niceties.

> "Justice, though due the accused, is due to the accuser also. The concept of fairness must not be strained until it is narrowed to a filament."
>
> *Snyder* v. *Commonwealth*, 291 U. S. 97, 122; 54 S. Ct. 330; 78 L. Ed. 674.

We respectfully urge that, upon this record, petitioner has not been deprived of any constitutional right, privilege or immunity.

or addicted to harmful habits (Civil Service Law § 14). Other requirements, if not complied with, terminate existing employment (New York City Charter §§ 887, 888, 895, 896, 901. For the convenience of the Court the full text of these sections is printed in Appendix A of this brief, pp. 17-18).

New York City Charter § 903 has for its purpose the assurance of the proper cooperation by a public employee in any proper inquiry by an authorized investigating body inquiring into matters affecting the City or the official conduct of the employee.

2. Historical background of Charter § 903.

Pertinent to a consideration of the constitutionality of New York City Charter § 903 is a brief review of the background and history of the section. The present Charter of the City of New York, including § 903, was enacted by the State Legislature as an "emergency" law pursuant to the Home Rule provisions of the New York State Constitution (Art. XII, § 2, amended and renumbered effective January 1, 1939 as Art. IX, § 11). The Charter was prepared by a Charter Revision Commission created by the State Legislature (L. 1934, ch. 867), and was submitted to the people at the 1936 general election. It became effective on January 1, 1938.

In large measure, the enactment of a new charter was the outgrowth of an investigation into alleged corruption in the government of New York City. As stated by Judge Seabury in his final report (*In the Matter of the Investigation of the Departments of the Government of the City of New York, Final Report by Samuel Seabury*, December 27, 1932, pp. 9-10):

> "My first and principal recommendation therefore is:

CONCLUSION

The judgment of conviction should be affirmed.

Dated, Brooklyn, New York
October, 1954

Respectfully submitted,

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